

INDEX

I. The basis of the Commission's decision.....	Page 1
II. Legislative History of Section 5.....	6
III. The evidence relied on by the Commission.....	8
Appendix.....	15

CITATIONS

Cases:

<i>Atlantic Refining Co. v. Federal Trade Commission</i> , 381 U.S. 357.....	8
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156.....	4
<i>Federal Trade Commission v. Cement Institute</i> , 333 U.S. 683.....	11
<i>Federal Trade Commission v. Colgate-Palmolive Co.</i> , 380 U.S. 374.....	11
<i>Federal Trade Commission v. Motion Picture Adv. Co.</i> , 344 U.S. 392.....	13
<i>Federal Trade Commission v. R. F. Keppel & Bro.</i> , 291 U.S. 304.....	13
<i>Investment Co. Institute v. Camp</i> , 401 U.S. 617.....	4
<i>Klor's Inc. v. Broadway-Hale Stores, Inc.</i> , 359 U.S. 207.....	5
<i>Securities and Exchange Commission v. Chenery Corp.</i> , 318 U.S. 80.....	1
<i>Sperry & Hutchinson Co. v. Louis Weber & Co.</i> , 161 Fed. 219.....	7, 8
<i>Universal Camera Corp. v. National Labor Relations Board</i> , 340 U.S. 474.....	11
<i>United States v. Addyston Pipe Steel Co.</i> , 85 Fed. 271, affirmed, 175 U.S. 211.....	11
<i>United States v. General Motors Corp.</i> , 384 U.S. 127.....	5
<i>White Motor Co. v. United States</i> , 372 U.S. 253.....	11

Statutes:

Administrative Procedure Act, § 10(e) (5 U.S.C. 706).....	12
Federal Trade Commission Act, 15 U.S.C. 45 <i>et seq.</i>	12
Section 5.....	1, 6, 9, 13
Section 5(c).....	12

II

Congressional and miscellaneous:

	Page
51 Cong. Rec. 1231-----	6
51 Cong. Rec. 13154, 13319-----	6
51 Cong. Rec. 14929-14930-----	8
National Commission on Food Marketing, <i>Organiza-</i> <i>tion and Competition in Food Retailing</i> , Tech. Study No. 7 (1966)-----	12
S. Rep. No. 221, 75 Cong., 1st Sess.-----	7

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-70

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE SPERRY AND HUTCHINSON COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

This reply brief answers respondent's contentions regarding (1) the basis of the Commission's decision, (2) the legislative history of Section 5 of the Federal Trade Commission Act, and (3) the evidence upon which the Commission based its judgment.

I. THE BASIS OF THE COMMISSION'S DECISION

Citing *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, respondent urges this Court to view the Commission's decision as resting solely on the basis that S&H's suppression of trading stamp exchanges and retailers' redemption activi-

ties restrained competition (Resp. Br. 9-11, 47-48). According to respondent, the Commission now "argues for the first time" in this Court that S&H's practices "should be condemned because they are unfair to consumers" (*id.* 6-7). We submit that examination of the Commission's findings and opinion, particularly in light of the course of these proceedings, leaves no doubt that the Commission issued its order not only because of the effect of S&H's activities on trading stamp exchanges and retailers, but also because S&H's practices were unfair to consumers.

From the outset it has been clear that S&H's practice of suppressing trading stamp exchanges and retailers' redemption activities was challenged because of its unfairness to consumers. Count III of the complaint charged that S&H's activities had the following adverse consequences for members of the public (App. I, 9):

(a) To suppress independent trading stamp exchanges, unfairly to the detriment of the persons engaged in such business or activity and *unfairly to the detriment of the members of the consuming public* who have thereby been deprived of the opportunity of exchanging one type of trading stamp for another in order to facilitate their redemption;

(b) To deny to the public the opportunity to redeem such stamps through persons other than the respondent, *to the injury of both the public and such other persons;*

(c) *To interfere unjustly, oppressively, and unreasonably with the right of the consuming*

public to enjoy the full use of their personal property and to transfer, alienate, or otherwise deal with such personal property as they see fit. [Emphasis added.]

Throughout these proceedings both sides have argued vigorously about consumer injury,¹ and the hearing examiner, after recognizing that Count III of the complaint charged unfairness to the public (App. I, 69-70), found that S & H's suppression of trading stamp exchanges had limited the alternatives of consumers and had placed consumers at a disadvantage (*id.* at 73).

The Commission found that S & H had prevented retailers from using an effective competitive device in competing with trading stamp company redemption centers, that it had curtailed the operations and competitive responses of a whole class of small businessmen, that the effect of such suppression had been to the detriment of the businessmen affected *and of the consuming public*, and that the practices were therefore "to the prejudice and injury of the public" (App. I, 125-126). The Commission adopted the examiner's findings on injury to consumers (App. I, 176):

Of course, the Commission's whole opinion does not revolve about the unfairness to the consumer of S & H's having suppressed trading stamp exchanges and competitive trading stamp redemption. The Com-

¹ See, *e.g.*, Commission counsel's proposed findings (Nos. 90-116) and briefs in support of them, *e.g.*, Complaint Counsel's Br. in Support of Proposed Findings, Conclusions, and Order 49-53), and Respondent's Exceptions to Complaint Counsel's Proposed Findings of Fact, Conclusions, and Order; and Counter Proposed Findings, pp. 33-37.

mission concerned itself with many other matters as well, including not only the injury to competition caused by S & H's practices regarding trading stamp exchanges, but also the history and structure of the trading stamp industry, the impact of trading stamps on retail competition and the scope of the remedy for violations under other counts in the complaint. In view of the position taken by S & H before the Commission it is understandable that the Commission's decision does not dwell at length on the question of unfairness to consumers. For S & H responded to complaint counsel's arguments in this regard by contending that it had valid business reasons for what it had done and that under Section 5 the Commission could not restructure the entire industry by ordering S & H to cease suppressing trading stamp exchanges in order to prevent injury to consumers (Answering Brief of Respondent to Appeal of Complaint Counsel, at pp. 41-43; see also *id.* pp. 24-40). In its opinion the Commission dealt with these arguments directly and rejected them (App. I, 172-174).

In short, the consumer unfairness issue is sufficiently articulated in the agency's findings and conclusions. The unfairness of S & H's practices to the consumer is no mere *post hoc* rationalization by appellate counsel,² but is one of the grounds considered by the Commission and leading it to the ultimate conclusion

² Contrast *Investment Co. Institute v. Camp*, 401 U.S. 617, 628; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169.

it reached. In view of the ample record (detailed in our main brief) that supports the Commission's findings and conclusions that S & H's practices were unfair to consumers, as well as injurious to competition, the reasons for the Commission's conclusion in this regard are more than apparent.

The court of appeals therefore erred in failing to consider the unfairness of S & H's practices with respect to consumers, as the dissent points out (App. III, 402-403). The Commission did not "rest its case solely on the determination that injury to a competitor exists," as the court stated (*id.* at 391). Instead the Commission found not only injury to competition but also injury to consumers and our opening brief discusses in detail why the Commission's decision should have been sustained on these grounds (Pet. Br. 27-42). We should add that, contrary to respondent's suggestion (Resp. Br. 12), the Commission does view S & H's activities in suppressing trading stamp exchanges, and in preventing retailers from exchanging S & H stamps for merchandise, as contrary to the basic policies of the antitrust laws. The attempts to eliminate the competition of "a whole class of small businessmen" (App. I, 125) that the Commission found in this record surely violated, at the very least, the underlying policy of the Sherman Act, see *United States v. General Motors Corp.*, 384 U.S. 127; *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, and could have served as a proper basis, without more, for the Commission's order. The

logically calculated to injure complainant" (161 Fed. at 221), including, for example, an attempt to induce S & H's customers to break their contract with S & H (*ibid.*). Indeed, after enumerating all of Weber's practices, the court concluded that its conduct was "no mere competitive course of action," but seemed "to fall little short of malicious, and may be said to constitute a clear case of unfair competition" (161 Fed. at 222). Given the context of congressional debate, it is clear that *Weber* was cited simply for this proposition: that it is an unfair method of competition to interfere maliciously with the business of another for the purpose of destroying that business (see 51 Cong. Rec. 14929-14930). There are of course no allegations that this is the type of conduct S & H has moved to suppress. In sum, this is not a case where the Commission has prevented S & H from taking action against activities that Congress considered unfair methods of of competition in 1914.

III. THE EVIDENCE RELIED ON BY THE COMMISSION

The remaining question is whether there is "warrant in the record" (*Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367) for the Commission to have entered an order against S&H on the basis of a combination of injury to competition and unfairness to consumers. We have already reviewed portions of the substantial evidentiary record supporting the Commission's order (Pet. Br. 5-11, 27-31). Here, we reply to respondent's claims regarding its view of the record.

a. In arguing that S&H's practices included in Count III of the complaint were not unfair acts and practices within the meaning of Section 5, respondent seeks to establish that these practices constituted excusable self-defense against activities that, unless checked, would severely injure S&H's business. Relying principally on the testimony of its officers, respondent quotes the examiner's footnote that he "was impressed with the candor of respondent's officials and with their experience" (App. I, 80, n. 14; Resp. Br. 27, n. 12)⁴ and the lower court's statement that the examiner had the opportunity to observe the "demeanor" of these witnesses (App. III, 393, n. 6; Resp. Br. 27).

But the candor and truthfulness of these witnesses could not make up for the lack of factual support for their testimony. S & H's witnesses testified that they believed that trading stamp exchanges would necessarily divert customers from S & H's retailer-licensees; that "unrestricted" redemptions would inevitably "seriously injure" S&H, and the injury would be "irreparable"; that the effectiveness of S&H's program depends on the housewife's being obliged to visit an S&H redemption center so that, remembering the

⁴The examiner said that he would, because of the candor of respondent's officials, credit their economic predictions, despite the testimony of consumers and operators of trading stamp exchanges which was to the contrary effect. *Compare* App. I, 80, n. 14 with App. II, 491-492, 494-496, 506-507, 510, 512; App. III, 26-27, 29, 48-50, 51-52, 57-63, 65, 77-78, 80-81, 84-85, 89-90, 97, 141, 146, 171-172 (testimony as to trading stamps' influence on customers' choice of retailers and effect of use of trading stamp exchanges on same).

value of this experience, she will thereafter associate the S&H redemption center's appearance and allegedly courteous personnel and high quality goods, with S&H stamps and S&H licensee stores dispensing such stamps.

However, there was no evidence of diversion of trade from licensees as a result of trading stamp exchange operations. There was a striking lack of evidence of loss of licensees, or even complaints to S&H from licensees, because of trading stamp exchanges. There was no evidence proffered to support respondent's theory that its business will be irreparably injured unless housewives are obliged to visit and be exposed to the redemption center. There was no evidence to support the theory of respondent's expert (Resp. Br. 27) that the "circular relationship from S&H to the retailer to the consumer and back to S&H" is an "essential ingredient" of the S&H promotional scheme that must not be broken by the escape of the consumer to a trading stamp exchange or to a retailer who accepts S&H stamps for merchandise. The Commission therefore concluded, after its comprehensive review of the record, that respondent's officials had (App. I, 172)—

testified in broad generalities that harm would come to respondent's system by the indiscriminate redemption [of trading stamps]. They offered no hard facts, however, to support their assertions on the issue.

In light of respondent's assertion that the Commission erroneously rejected the testimony of these witnesses and others (Resp. Br. 28-30), we have analyzed

this testimony in detail in Appendix A, *infra*, pp. 15-24, which shows that Commission had more than adequate reasons for rejecting it.

Respondent has not shown that the Commission abused its discretion in declining to accept these economic theories as facts. We submit that respondent cannot meet this burden, on this record. It is the Commission's economic expertise—not that of the courts of appeals, or the hearing examiner,⁵ or least of all the witnesses of the corporation under investigation for violation of the Act—upon which Congress rested the administration of the Federal Trade Commission Act (*Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374; *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 720). The Commission was therefore entitled to decline to accept the economic theories of the respondent's officials (see *Cement Institute*, *supra*, at 716), and to conclude that respondent had failed to establish its affirmative defense of economic justification.⁶ *A fortiori*, the Com-

⁵ Since economic analysis and inference is the issue, rather than credibility of witnesses regarding matters of historical fact, the doctrine of *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, is not apposite here.

⁶ Compare *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211, where the court held that a contract restraint may be affirmatively defended by showing that it is ancillary to and necessary to the achievement of the lawful main purpose of the contract, that the duration and scope of the restraint is not substantially greater than is necessary to achieve that purpose, and that the restraint is otherwise reasonable in the circumstances. See App. I, 174; *White Motor Co. v. United States*, 372 U.S. 253, 270 (Brennan, J., concurring).

mission was not obliged to agree with respondent's further economic judgment, based on these rejected theories, that the dangers of trading stamp exchanges to S&H "more than outweigh" the injury to the public of allowing S&H to suppress such exchanges (Resp. Br. 37).⁷

b. Respondent's assertion that "the uncontroverted evidence of record" establishes that consumers do not pay for trading stamps in the form of higher prices for goods (Resp. Br. 36) ignores its own exhibit, RX 24, which unequivocally states that the effect of trading stamps in stamp-saturated areas⁸ has been to increase food retailing mark-ups by the cost of trading stamps. Moreover, consumers do not receive "full value" for this weekly tax on groceries. Those consumers who give or throw away their trading stamps because they cannot consolidate them receive no value.⁹

⁷ Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)) provides that the findings of the Commission, if supported by evidence, shall be conclusive. See also Administrative Procedure Act, § 10(e) (5 U.S.C. 706).

⁸ Such markets are common and include many of the major cities in the country (see App. I, 110-111, 152; RX 1012; RX 936). Accord, National Commission on Food Marketing, *Organization and Competition in Food Retailing*, Tech. Study No. 7, pp. 457, 462 (1966).

⁹ App. II, 316-317; App. III, 61, 91. See also App. III, 9-11 (servicemen going overseas have no use for trading stamps and want to sell them for cash).

The present value of the 156 billion S&H stamps that have not been redeemed is \$390 million (Pet. Br. 6). Respondent concedes, and operates its business on the premise, that 5 percent of all its stamps (about \$140 million out of the \$390 million) are thrown away or otherwise never redeemed (App. I, 109, 139-140).

Those who own no car and cannot get to the redemption center receive no value.¹⁰ Those with little use for the gift items S&H distributes, or who do not need them as much as they need other goods or services that S&H does not furnish, do not receive "full value" for what they have paid, when they must spend parts of their limited incomes on something S&H determines they should nonetheless buy. The unfairness to consumers of S&H's practice of suppressing trading stamp exchanges and unauthorized redemption is obvious: customers are deprived of access to the only alternatives to S&H's compulsory redirection of substantial amounts of consumer spending along the lines S&H has selected to maximize its own economic gain.¹¹

¹⁰ S&H allows mail redemption only to those customers who live more than 25 miles from an S&H redemption center (Tr. 4929, CX 402, CX 403, CX 586). The customers of the witnesses Freeman and Caplan thus could redeem their stamps neither by mail nor in person (App. III, 208-209, 238-239).

¹¹ Respondent seeks to contrast the alleged mere "inconvenience" to the public of its practices with conduct which is "foul," "vicious," "fraudulent," "dishonest," or "which shock[s] the universal conscience of mankind" (Resp. Br. 17), in order to justify the conclusion that Section 5 does not reach the conduct involved here. Similarly respondent urges (Resp. Br. 21) that its conduct is, comparatively, less obnoxious than that condemned in *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304. We think it unnecessary to make a comparative moral assessment of the practices of the respondents in that case and this. In the government's view, Congress has left a considerable middle ground to the Commission's jurisdiction, between mere "inconvenience" and foul, vicious, shocking conduct (cf. *Federal Trade Commission v. Motion Picture Adv. Co.*, 344 U.S. 392, 396).

Respectfully submitted.

ERWIN N. GRISWOLD,

Solicitor General.

RICHARD W. McLAREN,

Assistant Attorney General.

A. RAYMOND RANDOLPH, Jr.,

Assistant to the Solicitor General.

GREGORY B. HOVENDON,

RICHARD H. STERN,

HARRY FIRST,

Attorneys.

HAROLD D. RHYNEDANCE,

Assistant General Counsel,

KARL H. BUSCHMANN,

Attorney,

Federal Trade Commission.

NOVEMBER 1971.

APPENDIX A

ANALYSIS OF TESTIMONY ON EFFECT OF TRADING STAMP EXCHANGES

Respondent relies upon the testimony of nine witnesses to support its prediction that "serious damage would be visited upon S&H" as a result of the operations of trading stamp exchanges or of retailers who exchange their goods for S&H stamps (Resp. Br. 27). In support of this prediction, respondent urges two subsidiary propositions: (1) such exchanges and redemption operations will cause consumers to divert their trade from S&H retailer-licensees to other retailers; (2) such operations will interfere with some "relationship between the consumer and the redemption center," by relieving the consumer of the obligation to visit S&H's redemption center and be exposed to (and thereafter remember) them and S&H's redemption merchandise (Resp. Br. 26, 27).

The record does not support these propositions. The factual data in the record points in the contrary direction. Those record passages on which respondent seeks to rely reflect speculative assertions that lack foundation. In several instances, the same witness' opinions, on direct and cross-examination, are mutually contradictory. In several instances the record shows that the witness did not intend the remarks attributed to him in the way respondent has construed

them. In no instance is there any factual support shown for these opinions, legal and economic theories, and predictions of future harm.

1. *Lee*. Respondent seeks to rely on the testimony of Stewart Lee, an economist called by Commission counsel as a witness on the effects on consumers and competition of S&H's alleged practices. Lee did not, contrary to the impression respondent seeks to create (Resp. Br. 27), testify concerning injury to S&H or its licensees as a result of the operations of trading stamp exchanges or competitive redemption. Examination of respondent's record citations shows that Lee was asked merely whether he thought, when a housewife exchanged a book of stamps for credit against the purchase of a religious picture and the book of stamps was thereafter sold to a trading stamp exchange operator \$1.50, that the retail licensees of S&H would be "getting the full measure of value for the promotional services" sold by S&H. Lee answered this convoluted question, "No" (App. III, 277).

Lee did not testify, as respondent represents, that "unrestricted trafficking in S&H stamps would be injurious to S&H and its licensees" (Resp. Br. 27); he expressly denied this. Asked for his opinion about the effect of trading stamp exchanges on S&H and its licensees, he stated that it is "imperceptible." Lee was then asked what would be the impact on S&H and its licensees of the removal of S&H's present restrictions on redemption or transfer of trading stamps; he stated

that there would be "a very minor, imperceptible impact" (App. III, 292-293).

Respondent quotes out of context, and incompletely, an alleged statement by Lee that it "would be reasonable" for S&H to impose the restrictions involved in this case (Resp. Br. 28). Counsel for respondent asked Lee whether he would not agree that "there was a reasonable basis from the company's point of view for conducting their business in that fashion," in view of the advantages to S&H resulting from use of the restrictions (App. III, 276). Lee answered, "It would be reasonable to have this restraint, I think, yes" (*ibid.*). At this point in the Appendix, the remainder of Lee's cross-examination is replaced by asterisks. Respondent fails to draw the attention of the Court to the pertinent colloquy which followed. Respondent's counsel went on to ask Dr. Lee what he meant when he said "it would be reasonable." Lee answered that he merely was recognizing that "the company wants to do that which is going to be most profitable to it, and therefore that is what I meant" (Tr. 4172). On redirect examination Lee further clarified the sense in which he used "reasonable." He testified that, as he used the term it would be "reasonable" for a firm to seek to maximize profits by engaging in price-fixing or other trade restraints (Tr. 4271-72). In short Lee did not testify, as respondent suggests, that the restrictions involved in this case are reasonable restraints within the protection of the "rule of reason"; his actual testimony was only that S&H was a rational business

concern trying to make high profits by using these restrictive practices.¹²

2. *Rossi*. Respondent relies heavily upon the direct testimony of Frank P. Rossi, a director of the company and its senior executive vice president. Rossi stated that it was his opinion that trading stamp exchanges had a "harmful" impact on the S&H promotional system. The testimony upon which respondent relies (App. III, 314) was that if the consumer could go elsewhere than to the store of an S&H licensee to buy or exchange stamps, then "obviously" the objective of the S&H program would be "defeated and the merchant no longer has the kind of promotion program that he has paid for. It no longer is a hard-hitting promotion program because it is watered down by this ability to acquire stamps in some other way."

On cross-examination, Rossi was asked whether there had been any effect on specific S&H licensees resulting from the activities of trading stamp exchange operators who had testified during the hearings before the Commission. Rossi admitted that he was not aware of any complaints from the S&H licensees in those areas (App. III, 317-318).¹³ When

¹² Moreover, it should be noted that the other quotations respondent attributes to Lee (Resp. Br. 28) do not represent the testimony of the witness Lee, but the language used by counsel for respondent, in questioning Lee.

¹³ The area involved was the south central United States. Respondent's claim that it could not prove injury to its operations resulting from trading stamp exchanges (Resp. Br. 30), allegedly on the ground that "S&H's business was protected from injury by trading stamp exchanges in that geographic area" by court injunctions (Resp. Br. 31), ignores the record

then asked whether he knew of a single complaint ever received by S&H from a housewife who patronized a trading stamp exchange, or from a licensee because of the operations of a trading stamp exchange, Rossi said he had no such knowledge (App. III, 320).¹⁴

3. *Beem*. Respondent relies on the testimony of its vice president, Eugene R. Beem, an economist. Beem testified that consumers who take their S&H stamps to an exchange, to swap them for another brand, thereby avoid the S&H redemption center and cause S&H to "lose the plus impact on those savers of an experience in the Sperry and Hutchinson redemption centers" (App. III, 356). According to Beem, the "plus impact" experience of exposure to the redemption center was critical to the S&H program (App. III, 356-357):

I think from the research that we have done that the most positive single thing that ever happened to any Sperry and Hutchinson saver is the experience of going into the redemption center and eventually effecting the redemption. In fact, there are some of our people who say

testimony of unenjoined trading stamp exchange operators in Fort Worth, Texas (App. III, 149), Corpus Christi, Texas (App. II, 463), and Tulsa, Oklahoma (App. III, 99).

¹⁴Rossi's admissions on cross-examination parallel the testimony of Walter A. Whitnack, another S&H executive vice president, who was in charge of S&H's sales operations (App. II, 438). Whitnack was asked whether he had ever received any complaints from an S&H licensee about unauthorized redemption or a trading stamp exchange; he had not. He also testified that he knew of no licensees that S&H had ever lost "because they were mad about" these practices (App. II, 442-443).

that you really cannot talk about a stamp saver until the saver has been into the Sperry and Hutchinson redemption center. It is terribly critical to us, in my judgment, to keep that ingredient which requires the saver of the Sperry and Hutchinson stamps to have that experience of going to the center and the exchange destroys it.

Beem also stated that going to an exchange, rather than a redemption center, would cause S&H to lose the benefit of "the factor of the remembrance value" (App. III, 356-357).

Beem did not offer a single survey or study to support his claims about the "redemption experience." No witness testified about having the experience or feeling its "plus impact." Beem did not rely on any studies or other evidence of the remembrance value of S&H's merchandise or the redemption experience. This omission is explained by Rossi's testimony that no such studies had ever been made (Tr. 5190-91).

4. *Phillips*. Respondent also relies on the opinion testimony of Charles Phillips, an S&H director (App. III, 384-385):

It is in my judgment based upon that thought and consideration that if you break the relationship between the consumer and the redemption center, you have broken an essential ingredient of this system. This is in a sense the payoff. This is where she gets the quality of merchandise. This is where she gets the merchandise of the visual nature which is in her

home. And these ingredients I consider essential and the loss of them would break the flow and the system.

Phillips offered no studies or surveys that provided support for this opinion, nor any first-hand or even hearsay accounts of incidents or discussions with consumers or S&H licensees that had led him to this conclusion. No consumer (or anyone but respondent's officials) testified in this proceeding that there existed any "relationship," circular or otherwise, between the consumer and the S&H redemption center, and no empirical evidence of any kind was offered to establish its existence—let alone to establish what would happen to S&H if something were to "break the flow" of it.

Nor is there any evidence in the record that trading stamp exchanges will "break the flow" of the redemption relationship. The only evidence is that trading stamp exchanges *increase* the flow of redemption, by enabling consumers to consolidate diverse stamp holdings and to secure the value of trading stamps that they would otherwise throw away *-(e.g., App. III, 61, 91).*

5. *Lewis.* Morris Lewis, an S&H retailer-licensee, testified that, in his opinion, trading stamp exchanges have a "detrimental effect" upon S&H licensees. On cross-examination, Lewis admitted that he had never had any experience with trading stamp exchanges (App. III, 324); that he did not know where a single trading stamp exchange was located (*ibid.*); and that

he had never complained to S&H about the operations of any trading stamp exchange (App. III, 325-326).

6. *McDonald*. Frank McDonald was the only S&H licensee, or other S&H witness, who had ever had any competitive experience with the exchange of trading stamps.¹⁵ McDonald could not recall, however, when the incident took place (App. III, 372-373). And he admitted on cross-examination that he did not know whether a single customer of his had obtained any S&H stamps through the exchange program; he could not name a single customer that he had lost as a result of it; and he did not know of any customer who had shopped any less at one of his supermarkets because of it (App. III, 374-375).

7. *Rance*. Respondent misstates and truncates the testimony of Morris Rance, a trading stamp exchange operator called by Commission counsel. In the same colloquy as that on which respondent relies (Resp. Br. 28), Rance stated that he did not think that his trading stamp exchange had diverted any patronage from S&H licensees, because the use of trading stamp exchanges did not change housewives' shopping habits (App. III, 176). He testified, also, that he knew of no instance where one of his customers had stopped trading with any S&H licensee after using his exchange (App. III, 171-172).¹⁶

¹⁵ S&H did not call as witnesses any of its retailer-licensees from the areas in which the trading stamp exchange operators who testified before the Commission did business.

¹⁶ This testimony is consistent with the entire consumer testimony in the record. Every consumer witness in this proceeding who was asked whether the use of trading stamp exchanges

8. *Caplan*. Morris Caplan, an S&H licensee who owned a general merchandise store in a small mill town (Ellicott City, Maryland), was called as a witness by Commission counsel. Caplan testified that he had accepted S&H stamps from his customers for partial credit on work shoes, inexpensive clothing, infants wear, and other "necessities * * * that they could not get at the S&H redemption centers" (App. III, 218-223), until respondent had required him to stop this practice (App. II, 488-489; App. III, 217). Respondent quotes (Resp. Br. 29) the language of its counsel and not Caplan, in putting a hypothetical question concerning a hypothetical non-existent "Murphy's" redemption or exchange operation. On redirect examination, Caplan testified that he thought that a trading stamp exchange would not "affect our business one way or the other" (App. III, 253; see also App. III, 257).

9. *Freeman*. Nelson Freeman was another S&H licensee operating a small-town department store, whom respondent prohibited from accepting S&H stamps in payment for his merchandise (App. III, 202-208). Respondent relies on Freeman's response to a question from respondent's counsel about customers' redeeming their S&H stamps at a hypothetical "Murphy's" (App. III, 210):

Q. What I am asking you is, if you paid out the good money for those stamps, do you think

affected her shopping habits or patterns answered in the negative (App. II, 494-496, 506-507, 512; App. III, 52, 65, 78, 84-85, 97, 146).

the S&H service is worth very much to you if a housewife can take the stamps instead to Murphy's?

A. No, I wouldn't think it would be.

On redirect examination, Freeman testified that it would *not* harm his business for one of his customers to go to the hypothetical Murphy's, because his customers would buy certain things at Murphy's store and other things at his store. Upon recross-examination by respondent's counsel, regarding the effect on his business of his customers' dealing with the hypothetical Murphy's, Freeman finally said, "You are asking a question that is in the air" (App. III, 212). When pressed for an answer he said that he saw nothing wrong with the transaction (App. III, 213), and he added that he thought his customers should have the privilege of redeeming the stamps wherever they wanted to (*ibid.*).

* * * * *

Taking the record as a whole, the Commission found that it did not support the predictions of harm made by S&H. We believe the Commission's rejection of respondent's economic theories would readily pass muster if a *de novo* evaluation of the record were made. But that, of course, is not the appropriate legal standard. The question is whether the record contains substantial evidence supporting the agency's views; measured by that standard, the Commission's order should be enforced.

